

APPEAL NO. 022351  
FILED OCTOBER 30, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 26, 2002. The hearing officer resolved the disputed issues by deciding that the claimant had disability resulting from the compensable injury for the period beginning on October 28, 1994, and continuing through the date of the CCH; that the appellant (claimant) is entitled to supplemental income benefits (SIBs) for the 1st through 7th quarters, October 24, 1997 through July 22, 1999; and that the claimant is not entitled to SIBs for the 8th through 19th quarters, July 23, 1999 through July 18, 2002. The claimant appealed the determinations of nonentitlement for the 8th through 19th quarters, arguing that the hearing officer erred by considering the peer review report because it was not prepared at a time anywhere near most of the qualifying periods for quarters 8 through 19 and because it was not based on personal examination. The claimant additionally argues that the peer review was conclusory and did not show an ability to work as required by the 1989 Act. The respondent (carrier) responded, urging affirmance of the determination of nonentitlement for quarters 8 through 19. The respondent appeals the determination of the 1st through 7th quarters. We note that the carrier's response is timely as a response but untimely as an appeal. See Section 410.202. The disability determination was not appealed and has become final. Section 410.169.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the 8th through 19th quarters. At issue was whether the claimant had a total inability to work during the qualifying periods, thereby satisfying the good faith job search requirement of Section 408.142 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The new SIBs rules effective January 31, 1999, apply to the qualifying quarters at issue on appeal.

Whether the claimant had no ability to work at all in the qualifying periods from July 23, 1999, through July 18, 2002, was a question of fact for the hearing officer to resolve and is subject to reversal only if so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer determined that the claimant had the ability to perform some work during the applicable qualifying periods although he did not make specific findings as to whether there was a narrative report from a doctor which specifically explained how the injury caused a total inability to work, or whether there were other records which showed that the claimant was able to return to work.

The hearing officer discussed the testimony and peer review report provided by Dr. P who opined that the claimant could have done sedentary work starting in approximately August of 1998. Dr. P testified that the records he reviewed would not support a total inability to work. He further testified that after July 1998 the treatment activity of the claimant's condition diminished and he would expect someone who sustained the type of injury the claimant did to have been able to work within a four year period after the injury occurred. Whether another record "shows" an ability to work is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 992920, decided February 9, 2000; and Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000.

The claimant argues that a peer review should not be considered "another record" and that it was remote in time from most of the qualifying periods at issue. The Appeals Panel has stated that while it is desirable to have the medical reports be as close to the qualifying periods as possible, medical reports outside the qualifying period at issue can be considered. Texas Workers' Compensation Commission Appeal No. 000096, decided February 29, 2000.

Dr. P's report was based on a review of the claimant's medical records and not a personal examination. We have not held, as a matter of law, that the report of a "peer review" doctor is not an "other record" as contemplated by Rule 130.102(d)(4). See Texas Workers' Compensation Commission Appeal No. 012309, decided November 13, 2001. Indeed, we have said that the "other record" is not even required to be a medical record by a doctor. Texas Workers' Compensation Commission Appeal No. 001723, decided September 8, 2000.

The hearing officer considered all of the evidence and found that the claimant had some ability to work during the qualifying periods at issue. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, supra; Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant is not entitled to SIBs for the 8th through the 19th quarters.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Michael B. McShane  
Appeals Judge